IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 51

UNITED STATES OF AMERICA, *Appellant*

v.

THE PROCTER & GAMBLE COMPANY, ET AL.

On Appeal From the United States District Court for the District of New Jersey

BRIEF FOR APPELLEE LEVER BROTHERS COMPANY

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April 14, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey granting the motion of Lever Brothers Company (Lever) under Rule 34 (F.R.C.P.) to require the Government to produce the transcript of testimony before the grand jury for

inspection and copying is reported at 19 F.R.D. 122 and reprinted in the record at R. 206. The opinion of the District Court denying a motion by the Government for reconsideration and rejecting a Claim of Privilege interposed by the Attorney General is reported at 19 F.R.D. 247 (R. 257). Other opinions filed by the District Court in this proceeding are reported at 14 F.R.D. 230 (R. 56) and at 19 F.R.D. 149 (R. 73).

JURISDICTION

The judgment of the District Court dismissing the complaint was entered on September 13, 1956 (R. 327). The Notice of Appeal was filed on October 4, 1956. The jurisdiction of this Court is invoked by Appellant under Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823 (15 U.S.C. 29) as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 869, 989. Each Appellee filed a motion pursuant to Rule 16 of the Revised Rules of this Court to dismiss the appeal or to affirm the judgment below on the ground that the order is not appealable. On February 25, 1957, this Court entered an order postponing further consideration of the jurisdictional question pending a hearing of the case on the merits (R. 565).

STATUTES AND RULES INVOLVED

The following statutes and rules are involved in this proceeding:

(i) Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2, and 4, commonly known as the Sherman Act.

(ii) Rules 34, 37, and 41 of the Federal Rules of Civil Procedure (28 U.S.C.) as amended.

(iii) Rule 6(e) of the Federal Rules of Criminal Procedure (18 U.S.C.).

The text of the foregoing rules is set forth in the Appendix, *infra*.

QUESTIONS PRESENTED

The following questions are presented:

1. Whether a party may obtain review of an interlocutory order for the production and discovery of documents entered under Rule 34 of the Federal Rules of Civil Procedure by requesting the trial court to dismiss the complaint?

2. Whether, in the circumstances of this case, the trial court abused its discretion in ordering Appellant to produce and to make available to Appellees the transcript of testimony of witnesses before the grand jury?

STATEMENT

This is an appeal by the United States (Plaintiff below) from judgments of the United States District Court for the District of New Jersey dismissing the present suit (R. 325-328). The United States instituted this civil suit under Section 4 of the Sherman Act charging violations of Sections 1 and 2 by Appellees in the soap and detergent industry. The scope of the complaint is vast, covering all phases of the industry (R. 1-16).

The complaint was filed on December 11, 1952, about two weeks after the discharge on November 25,

1952, of a grand jury which had investigated the industry for eighteen months (R. 207-208). No indictment was returned.

In the grand jury proceedings, the Government on three separate occasions caused comprehensive subpoenas to be served upon each Appellee (R. 430-431). It obtained hundreds of thousands of documents from the Appellees and from eighty-two other companies and individuals, including customers, suppliers, and competitors (R. 431, 471). About twenty-eight witnesses were examined before the grand jury; approximately ten of these witnesses were from companies other than the Appellees (R. 471-472).

After filing the civil complaint, the Government launched comprehensive discovery proceedings under Rule 34 (F.R.C.P.) In addition to the vast volume of documents and testimony before the grand jury, the Government on August 23, 1954, filed motions under Rule 34 for production by Appellees of additional hundreds of thousands of documents (R. 78, 92, 106).

Faced with the monumental task presented by the Government's initiative, and disturbed by the fact that after more than three years the Government was still engaged in discovery, the District Court (Modarelli, J., now deceased), expressed concern over the prospects that, unless effective procedural steps were taken, the defendants (Appellees) would require a similar extended period for discovery. On December 7, 1954, the Court said (R. 127):

> "One of my concerns is that since plaintiff has been preparing its case for probably three years, or longer, how long must we wait for defendants to prepare their case?"

Acting on the basis of current discussions of procedure in the "Big Case,"[1] the Court devised "a suggested manner of procedure" to define the issues, limit the documents to be produced, and generally to expedite discovery and disposition of the case,[2] and it subsequently entered the order allowing inspection of testimony before the Grand Jury.

These procedures, which included the development of a highly interesting and promising technique of requiring the submission of Tentative Statements of Issues of Fact and Law (R. 233-234, 238), were commended by counsel for both the Government and the Appellees (R. 219).

The Government's tremendous discovery proceedings were still in process at the time of dismissal of the complaint on September 13, 1956, almost four years after the complaint was filed (R. 325-328), but the Appellees had taken action in two respects to commence their own discovery. First, on July 15, 1953, at Appellees' initiative, the Government agreed to turn over to Appellees for their inspection, many thousands of documents of third parties which had been produced before the Grand Jury, pursuant to subpoena or otherwise, where those third parties did not object (R. 70). Second, the Appellees separately

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[1] McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 Harvard Law Review 27 (1950); Judicial Conference of the United States, Procedure in Antitrust and Protracted Cases, Summary of Prettyman Report and Conclusions, Judicial Conference Report, Sept. 1951, pp. 22-26; 13 F.R.D. 62 (1951); Judicial Conference Report, 1952, p. 18; Judicial Conference Report, Sept. 1953, p. 21; Judicial Conference Report, 1954, pp. 25-26.

[2] The program adopted was described in detail by the Court in the Appendix to its opinion directing production of the grand jury transcript (R. 218-239).

filed motions for orders to permit them to inspect and copy the transcript of testimony of witnesses before the Grand Jury.[3] These motions were not pressed or considered until after the Government had begun taking oral depositions in the autumn of 1955 (Gov't Br. 8-9), specifically, the deposition of Kelly Y. Siddall, an official of one of the Appellees, Procter and Gamble, who had also testified before the Grand Jury.[4]

The principal bases of Appellees' motions were as follows:

1. Access to the Grand Jury testimony was essential if Appellees were to be fully informed (R. 135). There was no adequate substitute. Depositions of the witnesses would be inadequate, particularly because the witnesses had testified in 1951-1952 as to events covering a long period of time prior thereto, and they could not be expected to recall either their testimony or the events involved upon depositions taken in 1955 or 1956, or later.

2. The Government admittedly had used the testimony and intended to use it for purposes of trial (R. 274).[5]

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[3] Lever and Procter filed motions under Rule 34 (R. 118, 134). Colgate filed under Rule 6(e) of the Federal Rules of Criminal procedure (R. 133).

[4] Procter and Gamble had resisted Siddall's deposition unless his Grand Jury testimony was made available for inspection to avoid duplication, surprise and unfairness. See Brief on Behalf of the Procter and Gamble Company in Support of Motion to Postpone or Limit Deposition of Kelly Y. Siddall, p. 5 (not printed).

[5] At the time it filed the complaint, the Government announced: "The filing of the complaint results from a careful and thorough investigation of the industry, including extensive grand jury proceedings" (Department of Justice Press Release, quoted by Court below, R. 211).

3. Not a single one of the Lever officials who had appeared before the Grand Jury was any longer connected with the company (R. 168, 535) and the principal Colgate witness had died (R. 473, 535).

4. Appellees' discovery and the trial of this enormous case would be greatly delayed and made more expensive if Appellees had to take the depositions of the twenty-seven living witnesses, instead of resorting to the convenient, readily available transcripts of their testimony.

On April 17, 1956, after elaborate consideration, the court granted these motions in order to avoid delay and duplication, in the interests of fairness and full, mutual discovery, and as part of sensible administration of the "Big Case" (R. 206). The court found that the "plaintiff is using the transcripts containing relevant information"; that "equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial"; and that "none of the reasons for the rule of secrecy applies" (R. 218). The trial court recognized that "there is a strong caveat against the needless intrusion" upon grand jury secrecy; that a "strong and positive showing should be required of persons seeking to break the seal of secrecy"; that disclosure would not be granted if it were "prejudicial to the public interest, useless or unnecessary"; and that the failure to allow disclosure in the circumstances of this case "would be an abuse of discretion and not in the furtherance of justice" (R. 217). Accordingly, the court concluded that "the ends of justice" required him to make the transcripts available to the defendants (R. 218).

On May 3, 1956, Appellant filed a motion for reconsideration (R. 247), together with a Claim of Privilege signed by the Attorney General (R. 248). The Attorney General claimed that "The Department of Justice holds the transcripts of grand jury testimony as a trustee for the benefit of the people. The privilege against disclosure of such transcripts is that of the government, and not of the witnesses .* * *" (R. 248). The trial court denied the motion for reconsideration and rejected the Claim of Privilege on July 9, 1956 (R. 257). The claim of privilege is not pressed by the Government in this Court (Gov't Br. 31, Note 13).

Appellees submitted proposed orders to implement the opinions directing the Government to produce the grand jury transcript (R. 241, 243, 245). These orders, identical in form (R. 330), required Appellant to produce the grand jury transcript of witnesses' testimony for copying and inspection within thirty days (*Ibid.*). The proposed orders did not specify any penalty for non-compliance.

At a hearing on July 23, 1956, before entry of these orders, counsel for the Government advised the court that the Government consented to the form of these orders (R. 329), but he stated that the Department of Justice would in no event produce the transcripts called for by the proposed order. Mr. McDowell, a Department of Justice Attorney, stated (R. 330):

> "I am instructed, Your Honor, by the Attorney General to inform the Court that the Government must respectfully decline to produce the transcripts called for by the orders which have been tendered".

The Court, nevertheless, entered the orders directing Appellant to produce the transcript within thirty days, i.e., on or before August 24, 1956 (R. 262-267).

Appellant, however, did not await the expiration of the thirty day period. On August 16, 1956, eight days before the deadline for compliance, Appellant filed a "Motion to Amend Or, Alternatively, To Stay [the] Order of July 24, 1956" (R. 317). Appellant tendered an amended order which provided that

> "unless the plaintiff on or before August 24, 1956 produces . . . and permits each of the defendants . . . to inspect and copy . . . the aforesaid transcripts of the testimony of witnesses who appeared before the said grand jury, *the Court will enter an order dismissing the complaint herein.*" (Emphasis supplied).

Neither the trial court nor Appellees had previously suggested that the action would be dismissed in the event of non-compliance; this proposal originated with Appellant. Appellant made clear that its sole purpose in proposing dismissal of the complaint was to enable it to appeal the production order. In support of its motion to amend the order directing discovery, Appellant submitted an affidavit by the Attorney General (R. 319) which stated that he deemed the court's rulings "erroneous" and that

> ". . . . It is my intention to seek review of that ruling in the Supreme Court of the United States."
>
> ". . . In my considered judgment, it would be unseemly for the chief law enforcement officer of the United States to be placed in the dilemma either of having to comply with a court order which he considers erroneous and compliance with

> which he deems contrary to the public interest, or, alternatively, with being required to disobey the order, without first having an opportunity for effective appellate review of the order."

This purpose—to obtain appellate review of the discovery order without either obeying or disobeying it—was reiterated by trial counsel for the Department of Justice at the hearing on Plaintiff's Motion to Amend on August 21, 1956 (R. 331). Mr. McDowell stated (R. 332):

> "Your Honor, our motion this morning seeks to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes."

Defendants then told the Court that they did not see how they could oppose a motion for dismissal of the case against them, although they believed that the order of July 23 was a "sufficient order at this stage of the proceedings"; i.e., prior to compliance or non-compliance by the Plaintiff (R. 334).

Accordingly, the motion of the plaintiff-appellant was granted. An "Amended Order" was entered on August 21, 1956, in precisely the form requested by the Appellant, which provided that unless the Appellant produced the transcripts on or before August 24, 1956, the Court would dismiss the complaint (R. 322).

Pursuant to its program of procuring an order of dismissal so that it might obtain appellate review of the discovery order, Appellant did not produce the transcripts, and so notified the Court by letter on September 7, 1956 (R. 362). Thereupon, the Court,

on September 13, 1956, entered its orders dismissing the action (R. 325-328). This appeal is taken from these orders of dismissal.

SUMMARY OF ARGUMENT

I. The government in this case seeks review of an interlocutory discovery order entered by the trial court in administering a "Big Case". The government voluntarily engineered and obtained the dismissal order. It was under no compulsion to do so, legally or practically. The underlying discovery order which caused it to seek dismissal of the case did not prevent it from going forward with its prosecution of the case. This case, therefore, is not like *Wallace & Tiernan* or *Thomsen* v. *Cayser, infra,* upon which the Government relies, in which further proceedings were impossible or futile.

II. If the government felt that immediate review was necessary because of the importance of the issue, it could have asked for an extraordinary writ or suffered a contempt order from which appeal would lie without disrupting the litigation in the trial court. However, it voluntarily chose dismissal, and it cannot now appeal.

III. The underlying order required the Government to allow Appellees to inspect the testimony of witnesses before the grand jury which had been used by the government for an 18-month investigation of the soap and detergent industry prior to filing the civil complaint. The Grand jury had long since terminated its business when the lower court entered the discovery order. The trial court found that the testimony was relevant. The government does not claim that the testimony is

privileged or that it is absolutely shielded by secrecy. The government has used the transcript in preparing for this case and proposes to use it at the trial. The government has used a grand jury transcript at the trial in other civil cases, and it recognizes the possibility that Appellees may obtain access to this transcript in connection with the testimony of witnesses at the trial in this case. It concedes, indeed it contends, that Appellees could obtain the substance of the testimony by oral deposition under Rule 26 (F.R.C.P.). But this would require many months of effort, would further delay trial, and would not be an adequate substitute.

IV. The discovery order was entered as part of a program of administering the Big Case. The case had been pending almost 3½ years. It was nowhere near trial. The Government had not even concluded its discovery, despite the preceding 18 months of Grand Jury investigation and the accumulation of hundreds of thousands of documents. The discovery order was a sensible means of giving Appellees information already recorded. Its denial would require five sets of counsel to travel throughout the country, taking the depositions of 27 witnesses (one of the major Grand Jury witnesses having died). Appellees clearly established "good cause" for production of the transcript.

V. This Court should not circumscribe the power of the harrassed trial judges to cope with the enormous scope of the Big Case, nor should it permit appeals from interlocutory orders direct to this Court, to be taken with the effect of disrupting the progress of these cases and transferring administration from the trial courts to this Court.

ARGUMENT

I.

THE ISSUE

In reality, there is a single issue before this Court: the freedom that will be allowed to district judges to cope with one of the most vexatious problems of judicial administration, namely, the management of the Big Case (see note 1, *supra*). This case does not present an abstract or general problem concerning the availability of grand jury testimony. It presents a narrow, limited question of the use of grand jury testimony, obtained for the Government's discovery purposes, in a subsequent civil suit.

Technically, the questions before this Court are two: (i) whether the case may be lifted from the trial court to this Court for review of an interim discovery order by the simple device of voluntary dismissal, and (ii) whether the trial court may, if it deems it necessary in the administration of the Big Case, afford defendants an opportunity to inspect the transcript of grand jury testimony as part of their discovery.

Actually, both questions are aspects of the same issue: Will this Court interfere, in mid-stream, with the trial court's efforts to save time and expense, to reduce the fantastic burden, and to assure complete mutual disclosure in a Big Case?

We respectfully submit that there can be only one answer to this question. This Court should encourage and not discourage trial judges to feel free to use all means at their command to short-cut the Big Case. It should not encourage or permit the delay consequent upon an appeal to review an interlocutory order in the Big Case.

It is well known to the antitrust bar and judges that, in the final analysis, only a vigorous trial judge willing to improvise procedures to fit the needs of the specific situation, can shorten the Big Case so that it can be tried within the life expectancy of the participants.[6] Rules are only subsidiary aids. Each case is different; and the best road to its end can be found only by allowing the widest latitude to the trial judge.

Certainly, in the context of the present case it cannot be said that the trial judge abused his discretion by ordering that the testimony of the witnesses who had been called by the Government in its "discovery" proceedings before the Grand Jury should be made available to the defendants.

At the time of the Court's ruling in April 1956, the case had actually been in process since December 1952, nearly 3½ years. It was nowhere near trial. The Government's discovery had not been completed despite the "blizzard of papers" obtained before the Grand Jury and the huge masses of additional documents turned over by Appellees during the civil case.[7] Appellees' discovery was in its earliest stages: Appellees were examing the documents turned over to the grand jury by third parties, p. 5 *supra*. It was clear that Appellees would move, among other things,

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[6] "Without a firm attitude on the part of the judge no measure for minimum volume, expense, and delay will be effective." Judicial Conference Report, Procedure in Antitrust and other Protracted Cases, 1951, 13 F.R.D. 62, 65.

[7] Appellees had produced thousands of documents in response to the Government's Motion for Discovery dated August 23, 1954, p. 3, *supra*. (See orders dated February 28, 1955; April 19, 1955; November 9, 1955, not printed).

to take the depositions of the 27 living witnesses who had testified before the Grand Jury because, as the trial court found, the Government had used and proposed to use this testimony at the trial (R. 213, 218).

It is important to obtain a realistic conception of what would have been involved in these 27 depositions: The witnesses were scattered all over the country (R. 169). About nineteen of them were not connected with any of the defendants at the time of the order respecting the transcripts (R. 471-472). Even if one defendant felt it was unnecessary to examine one of its officials who had testified, the other defendants would insist upon taking his deposition. To take the deposition of any of the persons who had testified before the Grand Jury, a time convenient to him and to all of the five sets of counsel in the case would have to be found. Each witness would probably be examined by at least several of the five sets of lawyers. In all probability, objections or issues would arise in the course of taking the depositions which would require recourse to the court (the filing of motions, etc.).

Is it any wonder, then, that the trial judge decided that it was entirely sensible and just to allow the defendants to inspect testimony of the witnesses before the Grand Jury instead of going through this needlessly elaborate process?

II.

THE GOVERNMENT'S CONTENTIONS

In this context, the Government's contentions seem, we submit, entirely trivial.

1. *Substantive:* On the substantive issue, the Government does not contend that the testimony of witnesses before a Grand Jury cannot be ordered produced for inspection and copying under Rule 34 in a subsequent civil case. It claims merely that Appellees have not shown "good cause" for such production in this case. It asserts that "disclosure of grand jury testimony may be ordered in a civil case only if a party makes an unusually strong, and a particularized showing that he cannot effectively try his case without breaching such secrecy" (Gov't. Br. 16).

It is not necessary to quarrel with the general thrust of this statement in order to sustain Appellees' position. Indeed, it seems absurd to argue that there was not "good cause" for the order entered by Judge Modarelli in the present case. The salient points are as follows:

> (i) The order was entered to facilitate the administration of a Big Case. About three and one-half years had elapsed since the filing of the complaint—and about five years since the commencement of the Grand Jury proceedings. The Government had not concluded its discovery. The weary court faced the prospect of additional years of discovery. It entered the present order as part of an elaborate procedure devised to administer the case and bring it to trial within a foreseeable time.

(ii) As discussed above, it is conservative to estimate that if Appellees were to take the depositions of the twenty-seven Grand Jury witness, at least a year would be required *for this process alone*, and it would not yield reliable information.

(iii) The Government concedes — indeed, it urges — that Appellees could take the deposition of the witnesses and could require them to disclose their statements before the Grand Jury (Gov't. Br. 46-47; see Rule 6 (e), Federal Rules of Criminal Procedure which prohibits the imposition of any obligation of secrecy upon any witness). *This consideration makes it entirely clear that there is no issue here as to the secrecy of the witnesses' testimony.* The only issue is whether there will be disclosure of the testimony *as recorded* before the Grand Jury, or *as recalled* by the witnesses upon subsequent examination.

(iv) Since the Government concedes that the testimony of witnesses before a Grand Jury may be made available for inspection upon a showing of "good cause", its position necessarily is that this Court should intervene and supersede the trial court's judgment as to the necessities of this Big Case. We cannot believe that this Court will announce its willingness to undertake a policing function of this nature, the effect of which will be to stultify the administration of Big Cases.

2. *Procedural.* On the appealability of the order in the present case, the Government does not dispute the point that it procured the dismissal in order to present to this Court for review the interlocutory discovery order involved herein. By this simple device of a

procured dismissal, which does not subject the Government to substantial hazards in an antitrust case, as we shall discuss, the Government seeks the right to transfer, in *medias res*, the administrative control of a Big Case from the trial court to this Court, by direct appeal.

As we shall show, their technical arguments to support their position are not sound; but apart from this, the result they seek would create chaos in the trial of big cases and add greatly to the already excessive burdens of this Court.[8]

III.

THE DISTRICT COURT'S ORDER OF DISMISSAL IS NOT APPEALABLE

A. The District Court's Order Is Not Appealable Because It Is Not a Final Determination of the Controversy

This appeal is an attempt by Appellant to obtain immediate appellate review of an interlocutory order of the District Court requiring the production of certain documents prior to trial. Such an order may not, of course, be appealed. Appellate review may be had only after adjudication of the merits of the controversy, or, prior to final determination of the controversy, only by disobeying the order to produce and incurring the penalty of contempt. *Alexander* v. *United States*, 201 U.S. 117;[9] *Cogen* v. *United States*, 278 U.S. 221; *Apex Hosiery Co.* v. *Leader*, 102 F. 2d,

[8] Since this Court is vested with exclusive jurisdiction to review civil antitrust cases to which the United States is a party (15 U.S.C. § 29), the burden of processing such appeals would fall directly upon this court.

[9] This Court stated in *Alexander* v. *United States*, *supra*, (201 U.S. at 121): "[S]uch an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the

702 (3rd Cir., 1939); *R. D. Goldberg Theatre Corp.* v. *Tri-States Theatre Corp.*, 119 F. Supp. 521 (D. Neb., 1944); Moore, Commentary on the U. S. Judicial Code 502 (1949).

In the present case, Appellant, instead of following the accepted procedures for review, has sought to convert a non-appealable order into a reviewable issue by the simple device of obtaining dismissal of the case. But this does not transmute an interlocutory order into a "final judgment". The order sought to be reviewed did not prevent or hinder Plaintiff from prosecuting its case. It did not dispose of the merits of the controversy. It was an interlocutory, intermediate, procedural order designed to expedite disclosure to Appellees of information which the Government was using and proposed to use at trial. It had none of the elements of a "final judgment".

Appellant's right to appeal in this case rests upon 15 U.S.C. § 29; 32 Stat. 823. The statute limits review to "final judgment[s]". Whether an order is final depends upon whether or not it represents a conclusion of the entire controversy. *Cobbledick* v. *United States*, 309 U.S. 323, 325-26. Piecemeal review of isolated issues has been forbidden by Congress (*Ibid.*).

Finality, as this Court has defined it, is a practical concept, not a matter of mere form. In other words, "A 'final decision' generally is one which ends the

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effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go further, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case."

litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233. Whether a motion and order "is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances". *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 802.

A dismissal which leaves the merits of a controversy undetermined and arises only from a collateral or subsidiary issue is not a final order.

It is not every dismissal order that is a "final judgment" giving rise to a right of appeal. An interlocutory order is not ripened for review by the simple process of a procured dismissal. Where the plaintiff obtains dismissal or consents to it, it is necessary to inquire into the nature and effect of the underlying order. This is illustrated by *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir. 1936). Plaintiff moved to remand an action which had been removed from a state to a federal court. When the motion to remand was overruled, Plaintiff moved for a judgment dismissing the case which was granted. The Court of Appeals for the Fourth Circuit held that the dismissal was not final because the underlying order refusing to remand was not final or appealable. In language which is especially apt here, the Court said (86 F. 2d at 297): "The crux of the matter is that an order to remand is not a final order, the plaintiff cannot make it in effect appealable by the simple expedient of taking a voluntary nonsuit and appealing." Compare *Parr* v. *United States*, 351 U.S. 513, and *V. O. Machinoimport* v. *Clark Equipment Co.*, 12 F.R.D. 191 (D.S.D.N.Y., 1951).

In contrast to the above cases are situations where the plaintiff is, in practical effect, prevented from proceeding with the controversy so that the order actually terminates the litigation between the parties on the merits of the case. Such an order is final. *St. Louis, I. M. & S. Ry. Co.* v. *Southern Express Co.*, 108 U.S. 24, 28. This was the case in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793. In that case certain orders of the District Court prevented the United States from using for purposes of trial, certain documents on which it relied. This made it impossible for plaintiff, the United States, to prove its case. The case was thereupon dismissed for failure of proof but without prejudice to bringing it another time. The dismissal was not at the invitation of the plaintiff. 336 U.S. at 794. Since the United States was, in actuality, precluded by the pre-trial orders from bringing its case again, it was able to obtain review of the dismissal.

The order of dismissal entered below is clearly not a final determination of this controversy on the merits, nor does it bring to this Court for review any order of the court below which either legally or practically determines the decision of the merits of the controversy. The Government raises only one issue here: the propriety of a direction, prior to trial, requiring the appellant to make available certain recorded testimony to the appellees.

Obviously, if this testimony had been made available, the Government would not have been prevented from proceeding with its case. Indeed, it would not even have been hampered in doing so, since it concedes that the substance of the testimony could have been

obtained by Appellees on oral depositions of the witnesses.

Accordingly, the present appeal does not meet the pragmatic standard of a "final judgment" laid down by this Court in *Cobbledick* and other cases, *supra*. The order presented for review did not, in fact or form, have the practical effect of terminating the litigation. It did not, as in *Wallace & Tiernan*, deprive a party of the use of indispensable evidence. It did not relate to the merits. Instead, it merely required disclosure to the defendants of information already available to the plaintiff.

There is no case in which such an order has been held appealable. In truth and in fact, the Government in the present case dismissed its case *not* because of compulsion resulting from a ruling of the court below, *not* because the merits had been determined as a practical matter, but because it wanted this Court to review "a question which has happened to cross the path of [the] litigation". *Segurola* v. *United States*, 275 U.S. 106, 112.

We respectfully submit that the decisions of this Court clearly establish that appeal does not lie in these circumstances. The entirely procedural and interlocutory character of the order is made dramatically clear by the circumstances under which the Government procured dismissal of the case. It obtained the dismissal order "to put in proper posture for review on appeal your Honor's ruling with respect to the production of grand jury transcript for civil discovery purposes" (R. 332).

The Government did not, and could not, claim that compliance with the production order would make it

impossible for the Government to prosecute the case. As the Attorney General said (R. 319), the Department of Justice considered the order "erroneous"; they decided not to comply with it but to seek review; and they proceeded to engineer a dismissal so that they could do this. They could have sought review on a contempt order, but they considered this to be "unseemly". Since they considered the "implications of the decision below" to be "profound and far reaching" (Jurisdictional Statement, p. 10) they could have asked this Court whether it concurred in the importance of the question and if so, whether it would grant an extraordinary writ under 28 U.S.C. § 1651. Instead, they took matters into their own hands, procured the dismissal of the case, and filed a direct appeal, invoking, so they hoped, the mandatory jurisdiction of this Court.

This effort at a forced play, we submit, must fail. Not only is the order presented for review interlocutory and non-appealable, but also the very fact that the Government, without legal or practical cause, except to obtain review at its own time and on its own terms, requested and procured the dismissal, necessitates disallowance of this appeal. The Government having chosen to dismiss the complaint in the absence of circumstances which precluded it from proceeding with the case, cannot appeal.

B. The Dismissal Order Is Not Appealable Because It Was Voluntarily Invited and Procured by the Appellant

There can be no doubt that the dismissal order herein was occasioned solely by the Government. The Government sought it; it was not sought by the Appellees; it was not imposed by the Court. More-

over, the Government's action was voluntary in fact as well as in form. There was no compulsion upon the Government to move for dismissal. There was no order or adjudication of the court, as in *Wallace & Tiernan*, *supra*, which made it impossible for the Government to go forward with its case. There was no circumstance, as in *Thomsen* v. *Cayser*, 243 U.S. 66, which demonstrated that further prosecution of the complaint would be pointless. The Government freely chose to dismiss, and having made this choice, it cannot appeal.

As the record shows, the original orders entered by the Court on July 23, 1956, provided no penalty for disobedience, p. 8, *supra*. They merely required production of the testimony within thirty days. In the event of disobedience, the Court had a variety of remedies and sanctions available to it under Rule 37 (F.R.C.P.). It could have done any one of the following things:

(i) It could have regarded the refusal as contempt of court.

(ii) It could have entered an order prohibiting the government from using the transcript at the trial or in connection with any depositions.

(iii) It could have prevented the government from introducing evidence to support certain claims or in opposition to various defenses.

(iv) It could have stricken parts of the complaint.

(v) It could have stayed the proceeding pending compliance with its order.

Dismissal was by no means inevitable, or even probable. The defendants—Appellees at no time

moved for dismissal or agreed to it.[10] It was voluntarily selected by the Appellant who, as we have described, proposed the dismissal, *not* because the order prevented successful continuation of the case, but because it desired to engineer this method of obtaining an appeal.

In these circumstances, we submit that there can be no doubt the Government may not appeal.

This Court has said on numerous occasions that a plaintiff who has voluntarily dismissed his complaint cannot sue out of a writ of error. *Evans* v. *Phillips*, 4 Wheat. 73; *Central Transp. Co.* v. *Pullman's Palace Car Co.*, 139 U.S. 24, 39. Lower courts have reiterated the rule. *Francisco* v. *Chicago & A. R. Co.*, 149 Fed. 354 (8th Cir., 1906, Sanborn, J.); *Marks* v. *Leo Feist, Inc.*, 8 F. 2d 460 (2d Cir., 1925). As the court put it in *Cybur Lumber Co.* v. *Erkhart*, 247 Fed. 284, 285 (5th Cir., 1918), "A plaintiff cannot except to his own motion for a voluntary nonsuit because, if it was error to grant it, he invited the error". See also *Kelly* v. *Great Atlantic & Pacific Tea Co.*, 86 F. 2d 296 (4th Cir., 1936).

The cases relied upon by the Government do not challenge this principle and do not lend any support whatever to the contention that the present order may be appealed.

In *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, the order presented for review barred the Government from using at trial, evidence adduced before an

[10] Counsel for appellees merely indicated that in the circumstances the amended order providing for dismissal "does not seem to be a relief which [they] could in any manner oppose" (R. 334-335).

illegally constituted grand jury. Without that evidence the Government could not prosecute its case. Additionally, the order of dismissal was not sought by the Government, but was entered by the Court on its own motion. Neither in fact nor in form was the dismissal voluntarily procured by the Government.[11]

In *United States* v. *Cotton Valley Operators Committee*, 339 U.S. 940, in which this Court was equally divided, the trial court had dismissed the complaint as a penalty imposed on plaintiff for its failure to comply with a discovery order. The action was dismissed at the initiative of the Court;[12] the Government did not propose dismissal. There is no basis whatever for a claim that the *Cotton Valley* case involved a voluntarily procured dismissal order.[13]

The Government's heavy reliance upon *Thomsen* v. *Cayser*, 243 U.S. 66, is misplaced (Gov't. Br. 23-27). That case (described in the margin[14]) did not involve

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[11] ". . . The record fails to sustain appellees' contention that the Government invited the court to enter this order denying relief and dismissing the action." (336 U.S. at 794).

[12] ". . . [T]he court announced that the only course left was to dismiss the complaint for failure to comply with its orders." 9 F.R.D. 719 at 721.

[13] *United States* v. *Zucca*, 351 U.S. 91, upon which Appellant relies (Gov't Br. 21-22) was likewise dismissed upon the Court's own initiative and not at the instance of the government. In a denaturalization proceeding, the Court "ordered the complaint dismissed unless the Government filed an affidavit showing good cause within 60 days. As this was not done, the complaint was dismissed without prejudice to the Government's right to institute an action to denaturalize the respondent upon filing the affidavit." (351 U.S. at 92.)

[14] *Thomsen* v. *Cayser* was a private action for treble damages under the Sherman Act. Plaintiff charged that defendants, who were common carriers, had entered into a conspiracy to grant rebates to shippers who had exclusively patronized defendants'

an appeal from an interlocutory order; there had been a trial and judgment on the merits for plaintiff which

lines. The trial court dismissed the complaint on the ground that the acts complained of did not constitute an unreasonable restraint of trade and no injury had been shown. *Thomsen* v. *Union Castle Mail SS Co.*, 149 Fed. 933 (D.S.D.N.Y. 1907). On appeal, the judgment was reversed, *Thomsen* v. *Union Castle Mail SS Co.*, 166 Fed. 251 (2d Cir., 1908). The Court of Appeals held that "whether the restraint of trade imposed by the combination was reasonable or unreasonable is, under repeated decisions of the Supreme Court, immaterial." The second trial resulted in a jury verdict and judgment for plaintiff. Before the case reached the Court of Appeals a second time, this court announced in *Standard Oil Co.* v. *United States*, 221 U.S. 1, and *United States* v. *American Tobacco Co.*, 221 U.S. 106, that the "rule of reason" was applicable to Sherman Act violations. In light of these cases the construction of the Sherman Act by the Court of Appeals on the first appeal was erroneous, and, as that court observed, the case had been retried on the erroneous premise that the rule of reason was not applicable to restraints of trade. *Union Castle Mail SS Co.* v. *Thomsen*, 190 Fed. 536 (2d Cir., 1911). In the view of the Court of Appeals, the record of the second trial did not establish an unreasonable restraint of trade (*ibid*). The court felt, however, that it would be "unduly prejudicial to the plaintiffs to reverse the judgment with directions to dismiss the complaint" because "upon another trial the plaintiffs may be able to produce additional testimony tending to make out a case," i.e., showing that the restraints were unreasonable. The court accordingly reversed the judgment and remanded the case for a new trial (190 Fed. at 537).

Plaintiffs thereupon advised the Court of Appeals in a petition that they "did not desire to present additional testimony and d[id] not wish a new trial of this action." (190 Fed. 1022). Plaintiffs stated that they were "willing to stand on the record as made" and that in lieu of an order remanding the case for a new trial, they preferred instead a "decision reversing the judgment and directing the court [i.e., the trial court] to dismiss the complaint in order that they may carry the case to the Supreme Court without further delay." (*Ibid.*) The Court of Appeals granted this request; it recalled the mandate and reversed the judgment with directions to dismiss the complaint.

It was on the record in this posture that this Court rejected a claim that the plaintiffs were barred from an appeal because they had consented to a judgment against them (243 U.S. at 83)

the Court of Appeals reversed because "as a matter of law * * * the acts of the defendants as disclosed upon the present record" did not constitute a violation of the Sherman Act. *Union Castle Mail SS Co.* v. *Thomsen*, 190 Fed. 536 (2d Cir., 1911). After the Court of Appeals had entered an order remanding the case for a new trial, plaintiffs informed the court that they "did not desire to present additional testimony" and that they were "willing to stand on the record as made" (190 Fed. at 1022). Further proceedings would therefore have been pointless; a new trial would have led to exactly the same result. There had been in effect a final determination on the merits. The situation was analogous to an order dismissing a complaint for failure to state a cause of action with leave to plead over; a plaintiff who elected to stand on his complaint would not be said to have solicited or consented to dismissal. The plaintiff's action in *Thomsen* was not in fact voluntary; it was forced upon him because he had no "additional testimony" to present.[15]

In the cases upon which the government relies, there is no doubt that the order of dismissal, as a practical

[15] In *Federal Baseball Club* v. *National League*, 259 U.S. 200, upon which Appellant relies (Gov't. Br. 25, note 9) the Plaintiff advised the Court of Appeals, after reversal of a jury verdict for Plaintiff, that it "does not desire to present additional testimony, nor does it wish a new trial, but it is willing to stand on the record as made" (269 Fed. 681 at 688). Petitioner in *Frey & Son* v. *Cudahy Packing Co.*, 256 U.S. 208, 210 "waived a new trial and consented to entry of final judgment" after the Court of Appeals had concluded that on the record "plaintiff cannot recover" (261 Fed. 65 at 67). In these cases there was only a question of law which had been resolved by the Court of Appeals after a trial on the merits adversely to Petitioner, so that the suits were terminated so far as the lower courts were concerned.

matter, precluded the plaintiff from proceeding further with its case. In *Wallace & Tiernan, supra*, the Government was denied access to evidence essential to its case; in *Thomsen* v. *Cayser, supra*, the case was over unless this court sustained Plaintiff's contention that the evidence of record established a violation of the Sherman Act.

Consideration of these cases in contrast with the present appeal illuminates the correct, rational line of decision which should be followed here. As this Court has repeatedly emphasized, determination of appealability and decision as to what constitutes a "final judgment" is a practical, pragmatic inquiry. In the present case, there was no necessity for the Government to seek a dismissal order. It chose to do so, despite the availability of other interim remedies and despite the fact that nothing in the underlying discovery order prevented it from proceeding with the case. Having made this choice, it has no standing to appeal. Certainly, it will not be permitted by this engineered dismissal to claim the attention of this Court, on direct appeal as of right, with respect to a procedural, interlocutory order.

C. The Effect of the Dismissal

The Government's brief suggests that it "believe[s]" that the order dismissing the complaint was with prejudice (Gov't. Br. 29, Note 11). Even if this is so, the appeal from that order may not be entertained: It was solicited by the Government; dismissal was not the inevitable or even the probable consequence of the Government's non-compliance because of the availability to the court of other remedies and sanctions; the effect of the order did not, as a

practical matter, prevent the Government from going forward with the case (contrast *Wallace & Tiernan, supra*); the litigation was not terminated as a practical matter in the sense that further proceedings would have been idle, as in *Thompson* v. *Cayser, supra*; and in any event, if interim review was desired, the Government had other procedures available to it including a petition for a preogative writ or appeal from a judgment of contempt.

However, we feel required to state that it is not clear that the dismissal was with prejudice. The order itself is silent on the subject, it being in the form proposed by the Government. The applicable rules indicate that the dismissal may operate as a dismissal without prejudice.

Rule 41(a)(2) provides that a dismissal "at the plaintiff's instance" is "without prejudice" unless the order otherwise specifies; the order of dismissal in this case was made upon "the plaintiff's instance" and does not specify that it is with prejudice (R. 327).

Appellant derives a contrary conclusion by incorrectly quoting Rule 41(b) as follows (Gov't Br. 29, note 11): "Rule 41(b) provides for 'Involuntary dismissal' [i.e., with prejudice] for 'failure of the plaintiff * * * to comply with * * * any order of court.'" The provision purportedly quoted, however, applies only to involuntary dismissals *on motion of the defendant*.[17] No such motion was made by defendants in the present case.

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[17] The first sentence of Rule 41(b) (with the language deleted by Appellant underscored) reads as follows:

> "For failure of the plaintiff *to prosecute or* to comply with *these rules or* any order of court, *a defendant may move for dismissal of an action or of any claim against him.*"

Appellant next refers to the last sentence of Rule 41(b) which provides that a dismissal *not provided for in the rule* is also with prejudice unless otherwise specified. That provision is similarly inapplicable because Rule 41(a)(2) *expressly* provides for dismissal by order of the Court "at plaintiff's instance"—precisely what occurred here.

Appellant seeks to assimilate this case to very different procedural situations. Thus, Appellant argues (Br. 21) that "If the production orders *as originally entered* had provided for dismissal in case of non-compliance, unquestionably the Government could have appealed a judgment of dismissal entered as a result of non-compliance, and could have tested the production order on such appeal." (Emphasis supplied) (See also Gov't. Br. 28.) The short answer is that the discovery orders as *originally entered* (the orders of July 23, 1956, R. 262 *et seq.*) did *not* provide for dismissal, p. 8 *supra*. In addition, Appellant maintains (Gov't Br. 22) that if "the court, upon non-compliance, had dismissed *on its own motion*, the production ruling could have been tested on appeal from such motion". (Emphasis supplied.) A dismissal by the Court on its own initiative under Rule 37 (b)(2)(iii) because of non-compliance with a discovery order is expressly declared by Rule 41 (b) to be "an adjudication upon the merits", unless the Court otherwise specifies in its order for dismissal.[18] But the dismissal here

[18] The dismissal order in *United States* v. *Cotton Valley Operators Committee*, 9 F.R.D. 719 (D. La. 1949), aff'd by an equally divided court, 339 U.S. 940, was apparently entered by the Court on its own motion as a penalty for non-compliance.

was *not* made by the Court "on its own motion". It was made at the instance of Plaintiff.[19]

In any event, the consequences of a dismissal with prejudice in an antitrust case like the present may easily be exaggerated. The complaint has been pending since December, 1952. Any relief that the Government may obtain in this case will be based upon the situation at the time of the decree. That will be some time in the future; and if the Government prevails in forcing Appellees to take the depositions of twenty-seven grand jury witnesses, it will be a long, long time in the future. Actually, the complaint is completely outmoded, even if it is assumed that it once had applicability to the facts. In the intervening years, the industry has been revolutionized by a change from basic use of fats and grease to chemicals and synthetics (R. 46).

If there is any basis for relief in the present case, a new complaint and a new set of allegations will be necessary in any event. While precise prediction is impossible, it would certainly be rash to assume in ad-

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[19] *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, upon which Appellant relies (Gov't Br. 13, 29) does not support its position. A state court in that case struck the pleadings of defendant and entered a default judgment in favor of plaintiff after defendant had refused to comply with an order to produce books and papers and certain persons for examination before trial. The motion to strike and for default judgment was made by plaintiff pursuant to a statute which provided that it shall be "the duty of the court, upon motion of the attorney general * * * to strike out the answer * * * and to render judgment by default" against any non-complying corporation. (212 U.S. at 339). In short, *Hammond Packing Co.* involved (i) an appeal from a dismissal with prejudice (ii) which was not made at the instance or with the consent of the party against whom the discovery order was entered.

vance that if—which is not the case—any antitrust violations exist, they would be barred by application of *res judicata*.

On the other hand, the procedure for which the Government contends is certainly a dangerous instrumentality. It will mean that in any case where a party is aggrieved by a discovery order, he may dismiss the case and appeal the order despite its interlocutory character. In the case of antitrust actions brought by the Government, this would mean a direct appeal to this Court (15 U.S.C. 29). The effect upon this Court and upon already excessively delayed litigation in the trial courts is readily apparent. This kind of piecemeal review certainly should not be permitted.

IV.

THE MERITS.

The only issue urged by the Government on the merits is that the Appellees failed to show "good cause" for the inspection of the testimony of the witnesses before the Grand Jury. The Government does not contend that a rule of secrecy should shield such testimony from inspection of a subsequent civil suit. Indeed, it stresses the fact that the defendants may discover what the witnesses said to the grand jury. (Gov't. Br. 46-47) Its position is merely that defendants should be required to do this by the long, elaborate, time-consuming, expensive process of oral deposition; and that it was an abuse of discretion for the trial court to say, in effect, that since the defendants can find out what each witness testified to, it is obviously sensible and appropriate to make available their testimony in already recorded form.

The issue presented is, therefore, extremely limited. We are not concerned with the considerations that might be present where access to testimony before a grand jury is sought while the grand jury is still in session. Here the grand jury had completed its sessions and had been discharged more than three and one-half years before the order was entered. We are not concerned with an effort to probe the deliberations of the grand jurors themselves. We are not here concerned with the considerations that might be present in a criminal case where the discovery allowed to defendants is more severely limited than in civil cases[20] and different policy considerations apply.

We are here concerned with a question which can arise almost exclusively in a handful of major, civil antitrust cases where the grand jury has served as an instrument for civil discovery, where no indictment has been returned, and where as the Government admitted, it is using and proposes to use the testimony of witnesses taken before the grand jury for purposes of the civil proceeding (R. 274; Finding of the Trial Court, R. 212-213).[21]

There is no doubt as to the letter and spirit of the law with respect to mutual discovery in a civil anti-

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[20] For example, in *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, this Court restricted the reach of Criminal Rule 17 to "evidentiary materials." See Comment, *Pre-Trial Disclosure In Criminal Cases*, 60 Yale L. J. 626 (1951).

[21] The Government did not concede that its purpose in convening the grand jury was restricted to discovery for a civil case. But that was the result. It is recognized and admitted that the Antitrust Division commonly uses grand juries for civil discovery (See R. 210-211, Note 7).

trust proceeding. It is to encourage, to compel, full, complete and unrestricted disclosure of relevant information. *Hickman* v. *Taylor*, 329 U.S. 495.

There is no doubt that the Appellees could discover the testimony of the grand jury witnesses by taking their depositions, although, as we have discussed this would have been an unsatisfactory substitute. There is no doubt that the Government could not, apart from the grand jury device, have taken the testimony of witnesses *in camera*, concealed from the Appellees. Indeed, a special Act of Congress applicable to the Sherman Act requires that "the taking of depositions" in such cases "shall be open to the public" "and no order excluding the public from attendance on any such proceedings shall be valid or enforceable" (15 U.S.C. §30; 37 Stat. 731).

In the present case, therefore, there is no question as to the right of Appellees to the discovery of the witnesses' testimony. The only question is as to method: Whether the trial judge, in the circumstances of this Big Case abused his discretion in making available to Appellees this testimony in the convenient, reliable form in which it was recorded before the Grand Jury, or whether he was forced to remit them to many months of labor and to subject them, the Government and the court itself, to the mammoth burden, expense and delay of pursuing the unsatisfactory substitute of taking the depositions of the witnesses.

As we have pointed out, the Government does not contend that there is a doctrine of secrecy of testimony before grand juries which bars such disclosure.